

Chapter 7

AN INDEPENDENT LAND COMMISSION

INTRODUCTION

Three interestingly written submissions were received by the Commission suggesting the establishment of an independent Land Commission. These submissions were from Reverend Siupeli Taliai, Dr Elizabeth Wood-Ellem and Dr Guy Powles and copies of their written submissions are attached to this report respectively in Appendix 27, Appendix 4 and Appendix 28.

Although the submissions differed in some respects, the desire for independence, fairness, transparency and accountability was common to all. Dr Powles believed that an important question to be considered now was whether Privy Council (which is now only an advisory body) and Cabinet should maintain the various powers they had before the political changes in 2010. This included the approval and renewal of leases, fixing rental rates, approving mortgages, surrenders and other powers. The political reform did not remove Privy Council's power to determine certain land matters, but should this body continue to exercise these powers and perform those functions?

The general intention before the political reform was to transfer the Privy Council's powers to Cabinet and change its composition, as mentioned below in this chapter. Would it not be better to let an independent statutory body advise on the exercise of these powers? It was proposed that such a body should be established and the functions of Privy Council and Cabinet over land matters should be given to the Minister of Lands to perform on the advice of this body. Decision-making in this process would therefore be greatly influenced by the new statutory body – the new independent Land Commission.

There are guardians in the current land system, which include the King, Estate Holders and the Ministry of Lands (Government/Cabinet). These guardians are well placed both socially and legally to make them good guardians of the current land system. The King has devolved His executive powers to Cabinet and He now assumes the status of an independent impartial leader and it would be unfortunate for the Monarch to be in a position of authority where he would be seen not to be impartial. This would occur in the instance of His Majesty heading Privy Council in deciding matters relating to lands as abovementioned. Estate Holders have appeared to be defensive and have been alleged to be acting with self interest in the recent past. The submission of the Land (Amendment) Bill 2010 to the Legislative Assembly in 2010 indicates that any land reform issues were likely to be politicized. The Ministry of Lands had also been considered as part of the problem regarding land matters. It would hence be hard pressed for the Ministry to win the trust of the public unless their services delivery would improve and manifest their independence and that they are incorruptible.

It is therefore important to consider carefully the best way to improve the current system while at the same time retaining the foundations that had formed the basis for Tonga's land tenure. It was therefore proposed by the Commission that the best option was to let the Minister of Lands take over all of the powers of Privy Council and Cabinet acting on the advice of an independent body – a new independent Land Commission.

7.1 AN INDEPENDENT LAND COMMISSION

The concept of an independent Land Commission to advise the Minister on the administration of the majority of key land related functions of the Privy Council, Cabinet and the Ministry has much merit. In these times of much political reform and increased democracy, the questions posed by Dr Powles, Dr Wood-Ellem and others are valid and timely. The questioning of the roles of Privy Council and Cabinet in land matters in the modern context, are the kind of questions that are key to the constitutional pathway that lays ahead for Tonga and its land practices and laws.

The proposal for an independent Land Commission is therefore timely and goes hand in hand with the recent political changes in Tonga. The proposed independent Land Commission would act under policy guidelines, using procedures designed to ensure outcomes such as transparency, legality and fairness between Estate and allotment holders, and the *overall* promotion of economic development.

7.1.1 ESTABLISHMENT OF AN INDEPENDENT LAND COMMISSION

The Commission supports the establishment of an independent Land Commission. The appropriate legislation setting out the legal status, functions, composition and term of appointment of the Commission should accord with the following discussions and recommendations:

(i) A statutory body

Both Dr Wood-Ellem and Dr Powles proposed that the independent Land Commission should be established by statute so that it becomes a statutory Commission. The Commission shall be independent of the Ministry of Lands.

RECOMMENDATION 87: That an independent Land Commission is established by legislation to oversee and perform designated administrative functions over land matters.

(ii) Functions

There were various functions proposed in the written submissions referred to above to be performed by this statutory independent Land Commission, which included the following:

(a) Examine the Constitution and Land laws

Reverend Siupeli Taliai proposed that the King of Tonga in partnership with the Parliament of Tonga should establish a Commission to examine on behalf of the people of Tonga the Constitution and Land Laws and provide recommendations to avoid violating human conscience and a collision with Divine Natural Moral law of Justice. Recommendations from this body must be approved by a referendum and not debated in the Tongan Parliament.

The Commission believes that the proposal made by Reverend Siupeli Taliai although brief strongly echoes the public's views in seeking fairness and transparency, and to ensure land rights, accord with Tonga's traditions and high morality. Seeking to avoid land matters being politicized was also of high importance. Although attractive, a referendum is a very intensive, time consuming and money draining exercise that would rapidly become impractical should all recommendations of the Commission need to be approved by referendum. A regular review process of every 5 years would enable the public to actively participate and contribute to the new Land Commission's duties. The Research Unit recommended later in this chapter could have its terms of reference (and number of years) extended to carrying out the first such review – to include the adequacy of the laws in light of their findings.

However, recommendations that are far reaching and important propositions relating to land matters should go to referendum from time to time. In effect, this current Commission has effectively performed a wide and comprehensive open ended 'referendum' by gathering the public's views and collating these into identifiable groups.

RECOMMENDATION 88: That part of the work of the independent Land Commission is to review the Constitution and Land laws to ensure equity, fairness and transparency as an ongoing process every five years.

(b) Supervise the implementation of the Royal Land Commission's recommendations

Many of the recommendations from the Commission's Phase One Interim Report and Phase Two Interim Report have been in general ignored by the Government, just as recommendations in the 1983 Royal Land Commission report were neglected. It is therefore likely that the recommendations of the Commission's final report may not be seriously considered and implemented. An independent Land Commission would ensure the Commission's interests, with the support of Government were pressed ahead.

This independent Land Commission would supervise the implementation of recommendations from the Royal Land Commission which are approved by Government and the Legislative Assembly of Tonga. It would also propose legislation required for the effective implementation of those recommendations. The idea of such a Commission was not new to Tonga as a similar Commission was established in 1917 to determine land boundaries. Implementation by another body such as the Ministry of lands could lead to conflicts of interest and inefficiencies of resources. This would not be appropriate.

RECOMMENDATION 89: That part of the work of the independent Land Commission is to oversee and advise on the implementation of the report and recommendations of the Royal Land Commission.

(c) Advise and provide recommendations to the Minister of Lands

The independent Land Commission would be given the power and resources to make inquiries and provide advice and recommendations to the Minister of Lands from time to time on major policy issues and specific cases when they arise. Such advice may be required in such matters as the availability of land for allotments, the size of allotments, holders ceasing to live on their allotments, abandonment of holdings, the rights of absentee holders, categories and terms of leases, leasing between Tongans, land use priorities for productivity and development.

RECOMMENDATION 90: That part of the work of the independent Land Commission is to make recommendations to the Minister and Government on major policy issues and specific cases when they arise.

(d) Advise the Minister on the exercise of administrative powers including powers transferred from Cabinet and Privy Council

The independent Land Commission would advise the Minister on the exercise of administrative powers vested in him under the Land Act. Examples of the exercise of such administrative powers under the Land Act would include:

Section	Issue to be decided
Section 7	whether land has become available
Section 8	what amounts to prior consultation
Section 10	projects of general public interest and benefit
Section 33(1)	whether 'such portions of the estate as ... will not, in the opinion of the Cabinet, be required for allotments within the

- term of the lease'
- Section 34(2) whether to reverse *tofi'a* holder's refusal to agree to grant
- Section 35 meaning of 'belonging to another locality'
- Section 36(1) whether to reverse *tofi'a* holder's refusal to grant new lease
- Section 44(1) what amounts to 'without reasonable cause' if refusing to accept the land granted
- Section 47(1) whether there is 'sufficient land for the purpose' when considering the amount of land available for tax allotments
- Section 49 'to facilitate survey of the prescribed areas'
- Section 50 land available for allotments
- Section 53(1) whenever it is possible so to do' to subdivide
- Section 55 'discretion' to permit exchange, and 'the benefit of a minor'
- Section 60 consent to renewal of lease
- Section 62 'planting and upkeep' of the allotment
- Section 68 whether he has not maintained the allotment 'in the average state of cultivation for tax allotments in the district
- Section 72 whether he desires to 'remove permanently'
- Section 73 whether land in the estate or Crown Land is 'available'
- Section 94 the 'state of cultivation'
- Section 95 compliance with planting' and the 'ability and character' of the applicant
- Section 100 for the purposes of 'improvement of the allotment', and whether the 'use to which the loan or advance or consideration is to be put constitutes an improvement
- Section 101 what constitutes an 'unallocated part' of a *tofi'a*, whether the total amount of all land mortgaged 'does not exceed five per centum of the total land comprising the *tofi'a*', and whether the use to which a loan or advance or consideration is to be put constitutes 'an improvement'

Section 105 whether to dispense with the consent of the mortgagor

The Land Act was not included in the large number of statutes that were amended by the Miscellaneous Amendments (Privy Council) Act 2010 or the Miscellaneous Amendments (General) Act 2010. As such, Privy Council and Cabinet have notionally retained powers over land matters provided under the Constitution and the Land Act including the approval and renewal of leases, fixing rental rates, approve mortgages, surrenders and other land related powers.

Should Cabinet, which is responsible for land policy, really be bothered with the day-to-day detail of land administration? As discussed in Chapter 5 of this Report, these matters could be handled and decided by the Minister of Lands after receiving advice from the independent Land Commission. This advice would be according to policy guidelines and procedures designed to ensure outcomes such as transparency, legality and fairness between the public and Estate Holders and the promotion of economic development.

RECOMMENDATION 91: Consistent with our discussion in Chapter 5 of this Report, that administrative land law functions presently performed by Cabinet and Privy Council be transferred to the Minister of Lands who will carry out these functions and functions/powers currently vested in him under the Land Act and the Constitution after receiving advice from the independent Land Commission.

(e) Receive appeals to be considered by the Land Tribunal and handle complaints

Two types of complaints can be made. Firstly, complaints against the Ministry of Lands regarding day-to-day issues such as delays in processing applications, which do not involve the exercise of powers referred to in 7.1.1(ii)(d) above.

Such a complaint can be filed with the independent Land Commission who would in turn refer it to the Complaints Division.. Should the complainant not be satisfied with the decision they could request a review of the same by the Land Tribunal. Secondly, complaints against the Minister's exercise of administrative powers. These complaints should first be referred to the independent Land Commission for consideration and advice to the Minister. An appeal may be made to the Land Tribunal on a point of law and whether proper lawful process was followed by the Minister in reaching the decision appealed against. The Tribunal shall not re-consider the issue on its merit except where the Minister has acted without the advice of the independent Land Commission.

The decision of the Land Tribunal can be reviewed by the Land Court on a point of law on application subject to leave granted by the judge of the Land Court.

RECOMMENDATION 92: That all complaints shall be lodged with the independent Land Commission. A complaint against the Ministry of Lands regarding day-to-day issues such as delays in processing applications shall be referred by the Commission to the Complaints Division. Should the complainant not be satisfied with the decision he could request a review by the Land Tribunal. Complaints against the Minister's exercise of his administrative powers shall be considered by the Commission and if not resolved it shall be referred to the Land Tribunal on a point of law and whether lawful process was followed by the Minister in reaching the decision appealed against but the Tribunal shall not otherwise re-consider the issue on its merit except in a case where the Minister has acted without the advice of the independent Land Commission. All decisions by the Land Tribunal can be reviewed by the Land Court on a point of law on application subject to leave granted by the judge of the Land Court.

(f) Report annually to the Legislative Assembly

The Commission should submit an annual report to the Legislative Assembly on all the matters that it dealt with as part of its functions.

RECOMMENDATION 93: That the independent Land Commission shall submit an annual report each year to the Legislative Assembly on all the work that it had carried out together with any recommendations that it may desire.

(iii) Composition and term of appointment

To ensure transparency and the trust of the people of Tonga, Reverend Siupeli Taliai proposed that this new independent Land Commission should be comprised of people of high moral sensitivity, in addition to technical expertise.

Dr Wood-Ellem proposed that the members of this Commission should be appointed according to their professional expertise in land matters and as representatives of the various districts in Tonga. This Commission's foremost priority has always been the interests of the country. The Minister of Lands should be a member of this Commission but he should not be the chairperson. The chairperson should be a lawyer. It is also important to appoint a number of proxies so that the work of the Commission should not be delayed due to unavailability of members.

Dr Powles suggested a tentative composition of the Commission to include representatives of the Royal Family, Estate Holders, Government and registered landholders as these are four sources of interest in the administration of land in Tonga.

The four members should be recommended by their peers, Royal Family, Noble Estate Holders', Government and registered landholders and confirmed by Cabinet. The Government representative shall not be the Minister of Lands or any employees of the Ministry of Lands. There shall be a fifth member who would be the Chairman to be appointed by the Commissioners representing the

four stakeholders. The Chairman may work full-time while the other members work part-time to minimize costs.

It was proposed that the Commissioners should be appointed by the King on the recommendation of the four stakeholders and work for a term of 6 years (so that their appointments were not politicized if their term of appointment is the same as the 4 year term of members of the Legislative Assembly). However, because such appointments would be executive acts the Commission considers it would not be appropriate to involve His Majesty in Privy Council in this process. His Majesty has also removed much of His involvement in matters of this nature to become a more independent leader for the country. This is also in line with Tonga's current political reforms.

The Prime Minister and Minister of Lands should both be consulted in the appointment of the independent Land Commissioners as the latter would have knowledge of the expertise required and the former would have the broader interests of Government in mind. Provided that they are both members of Cabinet and Cabinet is the highest executive authority in Government, it will be appropriate for the Commissioners to be appointed by Cabinet. However, because Commissioners are to represent stakeholders in the land system, each stakeholder should recommend to Cabinet those who are to be appointed as Commissioners to represent their interests.

RECOMMENDATION 94: *That the independent Land Commission shall be comprised of a member representing each of the four stakeholders in land, namely the Royal Family, Estate holders, Government and Registered landholders (recommended by the People's Representatives in the Legislative Assembly). Once appointed, the four Commissioners representing the stakeholders shall nominate a fifth member who is a law practitioner qualified to be a judge and shall be Chairman. The Commissioners and the Chairman shall be appointed by Cabinet for a term of six years. Alternates for each Commissioner and the Chairman shall be appointed in the same manner to act in the absence of the substantive Commissioner.*

7.1.2 RESEARCH AND ADVISORY UNIT

It is also proposed that the independent Land Commission should have a Research and Advisory Unit and this Unit would work together with the Ministry of Lands. Funding would be secured to finance this Unit for a period of six years. Appropriate skilled and expert people in Tonga and from overseas should be engaged in fact-finding and making assessments of needs for relevant land matters including housing and cultivation throughout the Kingdom. The Ministry of Lands' records are not complete and research would be required to confirm land availability for distribution and to be allocated for farming.

The Research and Advisory Unit should be required to submit six-monthly reports to the independent Land Commission. In considering these reports, the Unit might also have responsibility for on-going review of the Constitution and legislation as part of its collection of all information relevant to the formulation and review of land policy by the independent Land Commission who should pay special attention to the vision by Tupou I that land was to be made available to provide a home, food and security for His people.

RECOMMENDATION 95: THAT a Research and Advisory Unit be set up with appropriate staff to help with the work of the independent Land Commission and of the Ministry for a period of six years. The Unit's work shall include among other things, completing land records of the Ministry to confirm what land is available for distribution, fact finding and making assessments of needs for housing and cultivation in the Kingdom.

7.2 LAND TRIBUNAL

Dr Powles suggested the establishment of a Land Tribunal to deal with decisions made by the Minister of Lands and his staff in exercise of powers provided under the Land Act. Ministry officials regularly make the decisions required of them under the Land Act and the vast majority of the decisions involve simply applying the detailed statutory rules. There are also a considerable number of day-to-day decisions that require the assessment of facts and application of policy – thus the exercise of administrative discretion such as decisions required on matters referred to in 7.1.1(ii)(d) above. Where the consequences of these latter decisions can affect people's livelihoods, it is essential that the principles of natural justice should apply and that the decision-maker is impartial. The practice in most Commonwealth countries is for there to be a process of review available if required.

The Commission considers the Land Court is not the appropriate initial forum for dealing with complaints, or for the review of the decisions referred to in the above paragraphs. As presently constituted, it is questionable whether the Land Court has the power to review administrative decisions and it is of note that the Supreme Court is also barred from dealing with land disputes under the Constitution. A large range of land disputes are already allocated to the Land Court, particularly concerning title, succession and boundaries, together with the hearing of offences and proceedings for enforcement under the Land Act.

7.2.1 ESTABLISHMENT OF THE LAND TRIBUNAL

The review of administrative decisions in accordance with powers under the Land Act is best carried out by the Land Tribunal. There should be the opportunity for an aggrieved party to seek review of a Land Tribunal decision to the Land Court on the grounds of error in law and the jurisdiction of the Land

Court should be extended to cover this. As the issues on appeal would be one of law only, some might say that the Tongan Assessor (who advises the Land Court Judge on Tongan cultural and land matters) would not seem to have a function anymore. However, the Commission believes that the exercise of jurisdiction provision should not change and that the Assessor should remain. This is crucial to the overall balance and fairness of the proposed Tribunal functions. There could be a lot at stake in some of these decisions and, although the chair of the Tribunal would be qualified to be a Judge, the Judge of the Land Court would be senior, and probably more experienced.

The following outcomes would be achieved with the establishment of this Tribunal:

- (i) To provide experienced and impartial review of administrative decisions;
- (ii) To encourage Cabinet through the Ministry of Lands to formulate policy and to relieve Cabinet of the need to spend time on supervising its implementation;
- (iii) To consider complaints against the Ministry of Lands and act as an appeal body in respect of complaints against the Minister's exercise of administrative powers.

The Commission supports the establishment of a Land Tribunal to deal with complaints against the Ministry and to review on the exercise of administrative decisions.

RECOMMENDATION 96: That a Land Tribunal is established to deal with complaints against the Ministry and appeals for review of administrative decisions over land matters, and that appropriate legislation is drafted to establish the Tribunal. The decision of the Land Tribunal can be reviewed by the Land Court on a point of law on application subject to leave granted by the judge of the Land Court.

7.2.2 THE LAND TRIBUNAL SHALL OPERATE INDEPENDENTLY

It is proposed that a Land Tribunal be established which would act independently from the independent Land Commission.

RECOMMENDATION 97: The Land Tribunal shall act independently of the independent Land Commission and the Ministry of Lands.

7.2.3 COMPOSITION OF THE LAND TRIBUNAL

The Land Tribunal would be comprised of an experienced Tongan-speaking lawyer (qualified to be a Judge) as chair, with two experienced senior people (non-lawyers) as members. All three would work part-time, to keep costs down. It may be necessary to provide that the Land Tribunal's jurisdiction may be exercised by the chair and one member in the event that a member is absent overseas or on health grounds. However, as it is essential that the chair always be a lawyer, the Commission suggests that, to provide for the eventuality that he is unavoidably absent overseas or on health grounds, the legislation should contain a requirement that His Majesty in Council on the advice of the Judicial Appointments Panel should appoint another person who is qualified to be a Judge as an alternate if required.

As the function of the Land Tribunal is quasi-legal, all three members should be appointed by His Majesty in Council on the advice of the Judicial Appointments and Disciplinary Panel. In practice, it would be advisable for the Panel to consult with the Minister of Lands.

The members of the Land Tribunal should include persons with high integrity who have a good knowledge of land law and practices in Tonga with some legal or judicial experience and of the administration of the Ministry of Lands. The number could be restricted to three who would come together only to hear an appeal but would be serviced by an appropriate secretariat independent of the

Ministry of Lands. The appointment can go through the same process as for judges of the Supreme Court through the King in Privy Council.

RECOMMENDATION 98: That there shall be three part-time members on the Land Tribunal including a chairperson who is qualified to be a judge and two other members , who shall be appointed by the King in Privy Council on the advice of the Judicial Appointments and Disciplinary Panel. The Secretariat to the Land Tribunal shall be independent of the Ministry of Lands.

7.3 WORKING GROUP

The recommendation for the establishment of an independent Land Commission and a Land Tribunal involves the setting up of two new institutions. Major considerations would be the appropriate staffing and training and this may take time. There was also the consideration of costs to be borne by Government. In spite of these needs, the Commission strongly feels and recommends that the work of both an independent Land Commission and that of the Land Tribunal would be for the good and satisfaction of the people of Tonga with a transparent, fair and equitable application of land law and land rights to all.

To keep things moving forward toward implementing this and to avoid being merely put away and forgotten, the Commission suggests that a working group be appointed with the responsibility of implementing the recommendations of the Commission and for the establishment of an independent Land Commission and of a Land Tribunal. The working group can also consider the other recommendations of the Commission with a view to implementation by Government if it has the time.

The working group would include the Minister of Lands and some of his senior staff and other Ministers, civil servants appointed by Cabinet and representatives from the private sector and churches to give balance to the composition of the working group. The Commission suggests that it would be useful to include in this group the Secretary for the Royal Land Commission whose experience with the work of the Royal Land Commission would be invaluable. The working group would have a term of 12 months to complete the establishment of the independent Land Commission and the Land Tribunal, which may be extended if required.

The Land Tribunal is required urgently and should be brought into life as soon as possible. There should be little difficulty in finding three appropriate persons to be Tribunal members especially when they are on a part-time basis and finding the appropriate staff would not be a difficult exercise. Involvement of the Secretary for the Royal Land Commission in the staff of the Tribunal is again recommended.

RECOMMENDATION 99: THAT a working group be formed to develop the formation of an independent Land Commission and a Land Tribunal. The term of the group would be for 12 months or until the Land Commission and the Land Tribunal are formed and operating whichever is sooner. The group will include the Minister of Lands and a senior staff member, the Attorney-General, two representatives of the people to the Legislative Assembly, one representative from the private sector and one from the churches and the Secretary to the Royal Land Commission. Cabinet shall appoint a chairman for the group being a person who is appropriately conversant with the land law and practices of Tonga.

